No. 03-997

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In The Supreme Court of the United States

FREDERICK GORDON,

Petitioner,

v.

ROBERT T. MEANS and LINNEA M. MEANS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent takes issue with Petitioner's statement of the Question Presented and re-states the questions as follows:

A Rule of the Virginia Supreme Court requires Petitioner - a party to a Virginia Circuit Court Final Order - to provide all opposing counsel in that matter a Notice of Appeal upon his appeal of such Order to the Virginia Court of Appeals.

1. Is the Due Process Clause implicated at all where all parties seeking appeal of final civil judgments or other appealable orders must provide "opposing counsel" with a Notice of Appeal regardless of the nature of the matter appealed and where that term was previously defined by reported state case law?

2. If so, may a state appellate court apply this rule so that a Guardian *ad litem*, representing the interests of a minor child subject of an adoption proceeding, an active participant in the litigation, and a signature party to the final judgment appealed, supporting the Order, may properly be held to be a necessary and indispensable party to the matter, such that service of a Notice of Appeal was properly required in light of the appealing parties' right under the Due Process Clause?

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STATEMENT OF THE CASE

This matter arose from a Petition for Adoption filed by Robert and Linnea Means (herein "Means") in the Circuit Court of Fairfax County, Virginia. During the courtroom proceedings, the following counsel were present: Counsel for Means; Counsel for the birth father, Frederick Gordon (herein "Gordon"); a Guardian *ad litem*, representing the child subject of adoption; Counsel for the birth mother; and Counsel for the County of Fairfax, Virginia. Counsel for Means, Counsel for Gordon and the Guardian *ad litem* actively participated in the litigation of the petition. The Guardian *ad litem's* final report took a position opposed to Gordon and in favor of Means. At the conclusion of the proceedings, the Honorable Judge Leslie Alden entered a Final Order of Adoption on October 11, 2002 granting an adoption to Means. Attorney for Means and the guardian *ad litem* endorsed this Order as "Seen and Agreed." Counsel for Gordon endorsed this Order taking exception to certain aspects.

Gordon filed a Notice of Appeal to the Court of Appeals of Virginia October 31, 2002 regarding the Final Order of Adoption. That Notice was delivered to counsel for Means and the Court of Appeals of Virginia as required under Rule 5A:6 of the Rules of the Virginia Supreme Court for the Court of Appeals of Virginia.[1] However, the guardian *ad litem* was not served with a copy of the notice as required by that rule.

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[1]No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel files with the clerk of the trial court a notice of appeal, and at the same time mails or delivers a copy of such notice to all opposing counsel and the clerk of the Court of Appeals. Va.Sup.Ct.Rules, Rule 5A:6 (a).

Counsel for Means filed a Motion to Dismiss on December 16, 2002, on the basis that service on the guardian *ad litem* with the Notice of Appeal was required as he was opposing counsel to Gordon. On April 16, 2003, citing its own precedent, the Court of Appeals of Virginia dismissed the appeal for failure to comply with the Rules of the Virginia Supreme Court. App. B2

Gordon next sought relief from the Supreme Court of Virginia, which summarily dismissed the matter as "the decision of the Court of Appeals does not involve (1) a substantial constitutional questions [sic] as a determinative issue, or (2) matters of significant precedential value...," App. A1, and this petition for certiorari followed.

REASONS FOR DENYING THE PETITION

SUMMARY

Gordon's petition is devoid of reasons why this Court should exercise its discretion to grant certiorari. Apparently invoking Sup. Ct. R. 10 (c), Gordon contends that his Due Process claim is made to forestall "manifest injustice" and a result "contrary to the values and traditions long protected and preserved by this Court and by the Constitution of the United States." Pet. 4. Gordon tacitly alleges an unconstitutional vagueness in the Rules of the Virginia Supreme Court for the Court of Appeals of Virginia. Pet. 3. The Supreme Court of Virginia and Court of Appeals of Virginia, however, disposed of those claims by applying legal principles well-settled in Virginia law regarding the definition of this Rule which eliminated any potential vagueness. App A1, B2.

Gordon also attempts to draw into question the propriety of decisions of the trial court in this matter. Pet. 3. This Court's jurisdiction is necessarily limited to review of the decisions of the Supreme Court of Virginia and Court of Appeals of Virginia, 28 U.S.C. § 1257, and as such the propriety of trial court determinations is immaterial to the consideration of Gordon's petition. Gordon's petition, therefore, presents no "compelling reasons," Sup. Ct. R. 10, for this Court to grant review.

Gordon's Petition contains procedural defects, which preclude this Court from properly considering his claim and granting the review sought. The primary defect is focused on Gordon's claim of unconstitutionality regarding the rule of the Supreme Court of Virginia, a rule codified in Va. Code § 17.1-407 (Michie 2003). Gordon is required, pursuant to Sup. Ct. R. 29.4 (c), to recite that 28 U.S.C. § 2403(b) may apply and serve the Attorney General of Virginia with his initial filing to this Court. Gordon has failed to do so. As a result of this failure to properly notice the Attorney General of Virginia to this proceeding, the Commonwealth of Virginia has not been afforded the opportunity to defend its statute from a claim of unconstitutionality, a matter in which it certainly has a great interest. See *Maine v. Taylor*, 106 S.Ct. 2440 (1996).

Gordon failed to allege a statutory provision granting this Court jurisdiction to review this matter as required by Sup. Ct. R. 14.1 (e) (iv). Gordon failed to specify in his Statement of the Case, "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of

specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears ... so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Sup. Ct. R. 14.1 (g) (i).

The Court of Appeals of Virginia and the Supreme Court of Virginia, by refusing to hear the matter, relied on a previously established definition of the term, "opposing counsel," in Rule 5A:6 which removed any potential vagueness as it applied to Gordon. App A1, B2. The Court of Appeals properly rejected his characterizations of the rule as vague and held him to the previously defined meaning of the term. In seeking review from this Court, Gordon has failed to comply with it's rules by not properly stating the basis of review jurisdiction; failing to notice all interested parties; and failing to inform this Court of when the putative federal question was raised in the courts of Virginia and specifically refer to the record to substantiate that claim.

The Court should deny Gordon's petition.

I. Gordon's Due Process Claim Does Not Raise an Important Federal Question That Needs to be Settled by This Court

Although Gordon asserts that certiorari should be granted because Gordon's "Fourteenth Amendment Rights were completely overlooked due to an indefinite, undefined notice provision," Pet. 3, Gordon never identifies the manner in which Rule 5A:6 of the Rules of the Virginia Supreme Court is indefinite or undefined or otherwise

unconstitutionally vague such that it unfairly applied to him. This case has no Due Process implication regarding vagueness, as the language of Rule 5A:6 is clear and unambiguous regarding Gordon's obligations of notice. Additionally, it is plainly a matter of a state court interpreting and applying a neutral state court appellate rule in accordance with prior decisions of state courts.

The Supreme Court of Virginia rightly declined to hear this matter stating, "the decision of the Court of Appeals does not involve (1) a substantial constitutional questions [sic] as a determinative issue..." App. A1.

The Court of Appeals of Virginia, citing *Asch v. Friends of the Community of Mount Vernon Yacht Club*, 251 Va. 89, 91, 465 S.E.2d 817, 818 (1996), correctly held, "an appellate court cannot adjudicate an appeal unless all necessary parties are properly before the court." App. B2. "A necessary party is one whose interests are likely to be defeated or diminished by a successful appeal." *Hughes v. York County Department of Soc. Serv.*, 36 Va, App. 22, 25, 548 S.E.2d 237, 238 (2001). "Where a guardian *ad litem* has taken a position on behalf of the children in opposition to the appealing party, then the interests of the children are subject to being 'defeated or diminished' by the appellant's claim." *Id.* at 26, 548 S.E.2d at 239.

Gordon may not seek redress from this tribunal regarding the state Courts's determination that a guardian *ad litem* is, in fact, properly a necessary party. "This Court has no supervisory jurisdiction over state court, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution." *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 808 (1981). The application of a state court rule defining proper parties to an appeal does

not, on its face, invoke the Federal Constitution. As a result, Gordon is left to argue that the Rule itself is constitutionally deficient for not defining the term "opposing counsel." Gordon's claim amounts to an allegation that he was unaware of and unfairly surprised by the application of this Rule to him.

This position must fail. Notwithstanding the fact that the language of the rule is plain, approximately fifteen months prior to Gordon's Notice of Appeal deadline, the Court of Appeals of Virginia specifically addressed the term "opposing counsel" for matters involving guardians *ad litem* and held that a guardian *ad litem* must be provided Notice of Appeal in all matters for which the guardian has taken a stance in opposition to the appealing party. *Hughes* at 26, 548 S.E.2d at 239.

Gordon plainly did not comply with the requirements of the rule as stated in *Hughes* and the Court, relying on its prior definition of the term, properly held that Gordon's failure to notice a necessary party of his appeal barred consideration of any issues that may have otherwise been reviewable. It was Gordon's affirmative duty to know of this requirement and he failed to act accordingly. As a result of Gordon's failure, the guardian *ad litem* was not provided an opportunity to defend the interests of the child from being diminished or defeated in the Virginia Court of Appeals. Gordon's Petition does not center on a constitutional infirmity in the rule of the Virginia Supreme Court but rather on Gordon's failure to take all, previously established, necessary steps to preserve his right of appeal.

It should also be noted that Gordon's Petition concerns matters other than those properly before this tribunal. Pet. 1, 3-4. This Court's jurisdiction is necessarily

limited to a review of the final judgments and decrees of the Supreme Court of the Commonwealth of Virginia and in turn the Court of Appeals of Virginia in dismissing the appeal for his failure to notice the Guardian *ad litem*. 28 U.S.C. 1257. The propriety of the trial court's decision is not before this court and, despite Gordon's protestations to the contrary, should not be considered.

Petitioner merely wishes to circumvent the sound and time-honored practices of state and federal appellate review.

II. Gordon's Petition for Writ of Certiorari Fails to Comply with the Rules of this Court

Sup. Ct. R. 29.4 (c) states, "in any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State."

Gordon is apparently seeking relief from Rule 5A:6 of the Rules of the Supreme Court of Virginia on the basis of its alleged unconstitutional vagueness. Pet. 3. This Rule is a restatement of Va. Code § 17.1-407 (Michie 2003).[2] As such, Gordon is drawing into question the constitutionality of

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[2] The notice of appeal in all cases within the jurisdiction of the court shall be filed with the clerk of the trial court or the clerk of the Virginia Workers' Compensation Commission, as appropriate, and a copy of such notice shall be mailed or delivered to all opposing counsel and parties not represented by counsel, and to the clerk of the Court of Appeals. Va. Code § 17.1-407 (Michie 2003)

a statute of the Commonwealth of Virginia. Neither the Commonwealth, nor any agency, officer, or employee thereof, is a party to this matter. Gordon has failed to recite in the initial filing that 28 U.S.C. § 2403(b) may apply to this matter. Gordon further failed to serve the Attorney General of the Commonwealth of Virginia with his initial filings in this matter. Gordon has plainly failed to comply with the Sup. Ct. R. 29.4 (c) and in doing so has precluded the Commonwealth of Virginia from properly defending the constitutionality of its statutes, a matter in which it has a great interest. See *Maine v. Taylor*, 106 S.Ct. 2440 (1996).

Gordon states "this Honorable Court is conferred jurisdiction to review this matter on a writ of certiorari pursuant to Rule 10 and/or Rule 20 of the Rules of the Supreme Court of the United States." Gordon, however, fails to allege any statutory provision, which he believes, confers jurisdiction for writ of certiorari as required by Sup. Ct. R.14.1 (e) (iv).

Gordon has further failed to specify in his statement of the case "when the federal question sought to be reviewed was raised; the method or manner of raising it and the way in which it was passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears" as required by Sup. Ct. R. 14.1 (g) (i). See *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028 (1997).

PETITIONER'S MISSTATEMENTS OF FACT AND LAW

Petitioner repeatedly states that the guardian *ad litem* in this matter was "not a petitioner," "not a party," "not an appellee" and as a result Gordon was not required to provide him with a Notice of Appeal. Pet. i, ii, 1, 3. As is illustrated *supra* the applicable rule in this matter requires that "opposing counsel" receive proper notice of appeal. The guardian ad litem's status as a "petitioner," "party," or "appellee" is immaterial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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